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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

H T BECK, Plaintiff and Appellant, v. DONALD T. STERLING CORPORATION et al., Defendants and Respondents.	B204626 (Los Angeles County Super. Ct. No. BC362873)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Aurelio Munoz, Judge. Reversed and remanded.

J. Shaffer Smith & Associates, J. Shaffer Smith and Claudia A. Smith for Plaintiff and Appellant.

Klinedinst, G. Dale Britton and Gregory A. Garbacz for Defendants and Respondents.

SUMMARY

H T Beck was injured when he slipped on a foreign object or objects as he was halfway down a six-step outdoor stairway. He could not specifically identify the material that caused him to fall, but believed it to be debris from a broken step at the landing from which he descended, or from a pile of debris at the bottom of the steps. The trial court granted the property owner's motion for summary judgment. The court concluded that, while there were mechanisms that might have caused the accident if Beck had slipped on the top step or the bottom step, Beck could not demonstrate what caused him to slip in the middle of the steps. We conclude the court erred in granting the property owner's motion, and reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

H T Beck and his wife went to visit his sister-in-law at her apartment in a building on St. Andrews Place in Los Angeles on September 18, 2006. After a few hours, Beck wanted to retrieve some items from his truck, and decided to take a side exit (the door to which was propped open) from the building, because that exit was closer to his truck. The exit consisted of an initial landing step, followed by six steps leading down to the street level. It was about 7:30 in the evening, and the passageway was dark, but Beck could make out the definition of the steps. Beck was injured when he slipped and fell at the midway point of the six-step staircase.

Beck did not know exactly what he slipped on. However, there was a broken step and debris at the top of the landing leading to the staircase, and a pile of construction debris at the bottom of the staircase. (Beck fell when he was halfway down the steps; he did not slip on the debris on the landing and did not fall over the pile of debris at the bottom; when he fell, he hit the pile of debris at the bottom, and debris was embedded in a deep puncture wound in his left hand.) His deposition testimony on the cause of the fall was as follows:

"Q. Do you have any belief as to what caused you to start to slip?

"A. There was something on the steps there, either – and I don't know if it's gravel, dust, just construction material or what.

"Q. When you say, 'there was something on the steps,' what is the basis for you saying that?

"A. Because I could feel my feet roll over something.

"Q. So the object was large?

"A. No. It was like, I guess to put a size to it, something like either sand or pea gravel at the largest.

[¶]. . . [¶]

"Q. And it's your recollection that it felt like it [Beck's foot] was sliding on some gravel or some dust?

"A. Something."[1]

And again:

"Q. To your knowledge were there any pieces of stucco on the stairs?

"A. I don't – whatever I slipped on. I don't know what it was. And from what I seen at the top steps and bottom steps, I'm assuming that's maybe what I fell on. I slipped on something on the steps.

"Q But from your description of what you slipped on, it was more dusty --

"A. More sand --

"Q. -- and smaller --

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[1] The debris at the bottom of the stairs "was stucco and there was dog feces, and leaves, grass." Beck was asked if there were any pieces of concrete in the debris pile, and said, "There was one, I think, or I'm not for sure exactly how many." The debris on the landing was the same type of debris as that at the bottom of the stairs. "It was stucco. I'm assuming – that's what it looked like from my – stucco."

"A. More small pebble type."

In a subsequent declaration, Beck stated:

> "I did not mean to testify or imply that I stepped or slipped on a single object the size of sand or pea gravel. It was too dark to see exactly what it was, but I slipped and my foot rolled over because there was construction type material on the step. I gave the example of sand or pea gravel to put a size to the make up of the debris."

Beck and his wife sued the owners of the building, Donald T. Sterling Corporation and others (Sterling) for personal injuries and loss of consortium, alleging his fall was caused by a dangerous condition of the property, including a poorly maintained stairway, inadequate lighting, debris on the walkway, and unsafe and improper handrails.

Sterling moved for summary judgment, asserting there was no evidence Sterling knew or should have known of the presence of the "purported 'sand or pea gravel' sized object on the outdoor emergency stairway," and no evidence of how long it was there before Beck's fall. In support of its motion, Sterling submitted excerpts from Beck's deposition testimony, and a declaration from Soonae Kim, the property manager for the apartment building. Specifically:

- Property manager Kim's declaration stated that she conducted daily inspections of the entire complex, making a visual inspection for unsafe conditions. During those daily inspections, she "did not observe anything to make me believe that any area on the premises was dangerous." She stated that she "first learned of a damaged landing step in the north emergency fire exit stairway [where Beck was injured] during an inspection in October 2006," and "[t]his was never reported to me by [Beck]." Kim also stated she had walked through all entrance and exit areas "on numerous occasions and [had] never slipped," was not aware of any slip and fall incidents other than this one, and no one had ever complained to her that any area at the complex was either slippery or dangerous.

- Beck's deposition testimony has been described above. In addition, Sterling cited Beck's testimony that the surface was not wet; he was holding a handrail, which was well attached, when he fell; Beck did not know how long the condition of the center landing step (the broken step at the top of the landing) had been in existence; Beck did not know how often the area was inspected; and Beck never went back to look at the step.

In opposition to Sterling's motion, Beck presented, in addition to his own declaration (mentioned *ante*), a declaration from his sister-in-law, In Sook Kim, and a declaration from Morris Farkas, a licensed professional safety engineer. Specifically:

- Sister-in-law Kim stated that she had resided at the apartment on St. Andrews Place continuously since January 2006. The doorway Beck used was "usually propped open and is used regularly for going in and out of the building." The day after Beck fell, she took a number of photographs of the area where the fall occurred, and took additional photographs two months later, on November 13, 2006. Copies of her photographs were attached to her declaration. She further stated that she first observed the broken top step at the landing, and the debris discarded at the bottom of the stairway, "at least two months before my brother-in-law's fall." She also stated that she observed the exterior light at the top of the stairway on various occasions before Beck's fall, and "[o]n those occasions for a period that I would estimate to be around a month or more, I never observed that particular light to be on at night." On September 19, 2006, the day after Beck's fall, she observed that "that exterior light was still not illuminated."
- Farkas's declaration recited his credentials as a safety engineer expert and his review of the various depositions, photographs and documents related to the case. The photographs included one taken at night by sister-in-law Kim the day after the accident, showing that the light fixture above the handrail

was not illuminating the stairway.[2] The photographs also included images of the broken step, and the debris at the bottom of the stairs, taken the day after the accident. Farkas stated the photographs showed that the debris at the bottom of the steps included dirt, leaves and remnants of discarded cigarettes among the pile of broken plaster and concrete, and showed it was "obvious that this condition existed for an appreciable period of time prior to [Beck's] fall and injuries." Farkas also compared the photos of the broken step taken the day after the accident and two months later, observing that "it can be seen how much the broken step continued to disintegrate. This continual disintegration of the top step caused pebbles to be deposited first on the top landing adjacent to the broken step, and then tracked onto the stairs where [Beck] previously fell on 9/18/06." Farkas cited property manager Kim's deposition testimony indicating that it appeared to her from the photographs that the debris from the broken step was put at the bottom of the stairs.[3] An invoice from Garcias Iron Work showed that the broken step was repaired on November 13, 2006. Farkas opined that Beck's accident was caused by Sterling's failure to comply both

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[2] Farkas also stated that Beck testified, at his deposition, that "when he had exited the building onto the landing at the top of the stairs, he noticed one large chunk of stucco debris on the landing that was approximately 18 to 24 inches long by 3 to 4 inches wide," and "[Beck] stepped over this piece of stucco debris in order to walk down the steps." The transcript of this part of Beck's deposition is not in the record.

[3] Property manager Kim was asked: "Q. Going back to Exhibit 4 for a second, it looks to me like the debris at the bottom of the stairs is from the breakage on the top stair. Did you ever find out if that's where that debris came from? . . . The Witness: Seems like from broken here somebody broke it and then put it down here, I think."

> with applicable building codes and with the standard of care for professional management of a residential apartment building.[4]

Beck also submitted a statement of additional disputed facts, with citations to and based principally on the Kim and Farkas declarations.

Sterling replied to Beck's opposition papers, contending there was no evidence Sterling had notice of either a purportedly faulty light or of gravel or dust debris on the stair. Sterling also argued that sister-in-law Kim's declaration was not substantial evidence of a triable issue of fact, because Beck's discovery responses had indicated that no one acting on his behalf inspected the scene of the incident or had knowledge of the incident.

The trial court's tentative ruling was in Sterling's favor. At the hearing, Beck's counsel's stated, "That stairway looks like Beirut. That did not happen over night," and the court replied, "I know. It's a horrible-looking stairway, and you have all kinds of stuff on the bottom and on the top, but nothing to show what's in the middle." The court agreed to "take another look at it," but later that day issued a minute order granting Sterling's motion for summary judgment, stating:

> "[Beck] has failed to demonstrate the cause of the accident. He shows there were mechanisms that might have been causes of the accident, had he slipped on the top step or the bottom step. However, he claims he fell on a piece of gravel or a pea sized pebble like object. He never went back to see what it was, and under the circumstances it would appear that he just might have slipped because of clumsiness rather than because of an object on the stairway."

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[4] Farkas stated that, with the exterior light not working, the lighting on several of the steps below the landing was so low that it could not be registered by a light meter, and even when illuminated the lighting of the stairway violated the building code. Farkas also stated that the stairway violated building code provisions requiring handrails on both sides of the stairway, and opined that Sterling failed to maintain a means of egress from the exit door down the stairway that was continuous and unobstructed as required by various provisions of the building code.

Judgment was entered on November 6, 2007.[5] Beck filed a timely appeal.

DISCUSSION

An owner of premises is not the insurer of a visitor's personal safety, but does owe visitors a duty to exercise reasonable care in keeping the premises reasonably safe. (See (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) To establish the owner's liability on a negligence theory, the plaintiff must prove duty, breach, causation and damages. (*Ibid.*) "A plaintiff meets the causation element by showing that (1) the defendant's breach of its duty to exercise ordinary care was a substantial factor in bringing about plaintiff's harm, and (2) there is no rule of law relieving the defendant of liability. [Citation.] These are factual questions for the jury to decide, except in cases in which the facts as to causation are undisputed." (*Ibid.*) Further:

> "'The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' [Citation.] In the context of a business owner's liability to a customer or invitee, speculation and conjecture with respect to how long a dangerous condition has existed are insufficient to satisfy a plaintiff's burden." (*Id.* at pp. 1205-1206.)

"Whether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury . . . ." (*Id.* at p. 1207.)

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[5] Five weeks after the judgment was entered, the trial court signed an "order re: motion for summary judgment." In this order, the court stated: "Because [Beck] cannot show what condition caused the incident, if any, he cannot show that [Sterling] acted negligently in allowing the existence of any condition that caused his fall. He likewise cannot show that [Sterling was] on actual or constructive notice of a condition that he did not and cannot identify."

In this case, the trial court ruled as a matter of law that Beck produced no evidence of the cause of his fall. We must respectfully disagree with the trial court's conclusion, which requires one to put on blinders to the reasonable inferences that may be drawn from Beck's evidence. There was evidence of a broken step and debris at the top of the landing, and similar debris at the bottom of the steps, and the trial court itself intimated that had Beck slipped in either of those two places, its conclusion would be different. All Beck must do is "'introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.'" (*Ortega v. Kmart Corp., supra*, 26 Cal.4th at p. 1205.) The trial court effectively usurped the function of the jury when it concluded that "[Beck] just might have slipped because of clumsiness rather than because of an object on the stairway." He might have, but that is for a jury to decide. If Beck's testimony is believed, it would be entirely reasonable to conclude that he slipped on debris that was tracked up or down the stairs from the broken step at the top of the landing or from the pile of debris at the bottom of the stairs – which the trial court itself described as "all kinds of stuff on the bottom and on the top . . . ."

Sterling insists that, because Beck cannot definitively identify the "object" upon which he slipped, "he is by definition unable to prove that the object was present for a sufficient period of time to put [Sterling] on notice of its presence. After all, without knowing 'what it was,' [Beck] cannot demonstrate 'how long it was there.'" The argument is specious. We have already rejected Sterling's premise that Beck cannot prove his case without specifically identifying the precise "object" on which he slipped; circumstantial evidence suffices on this point as on any other question of fact. (Cf. *Hatfield v. Levy Bros.* (1941) 18 Cal.2d 798, 805 ["circumstantial evidence . . . is nothing more than one or more inferences which may be said to arise reasonably from a series of proven facts"].) Certainly Beck must show that Sterling had "actual or constructive knowledge of the dangerous condition that caused the accident." (*Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 477.) But the "dangerous condition that caused the accident" was not simply the debris on which Beck says he slipped; the dangerous

condition necessarily included the source of that debris: the broken step at the top of the landing and the pile of debris at the bottom. Beck produced evidence, in the form of his sister-in-law's declaration, that those conditions existed for at least two months prior to the accident. (And, those conditions continued to exist for two months after the accident, until the broken step was repaired on November 13, 2006.) Farkas's declaration and analysis of the photographs also supported the conclusion that the debris piles had been there for an "appreciable period." A reasonable fact finder could certainly conclude, if Farkas's and the sister-in-law's evidence is believed, that the broken step, the debris at the bottom of the stairway, and the lack of illumination existed long enough for a reasonable owner to have discovered them. (*Ortega v. Kmart Corp., supra*, 26 Cal.4th at p. 1207 ["[w]hether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury"].)

Finally, Sterling suggests that sister-in-law Kim's declaration should be ignored, because Sterling was "sandbag[ged]" by the "last-second declaration," as Beck did not identify Kim as a witness in response to Sterling's interrogatories. It is true that Beck responded "no" to the question whether anyone acting on his behalf "inspected the scene of the incident" or had knowledge of the incident.[6] However, Sterling *knew* Beck's sister-in-law had "inspected the scene of the incident," because she took pictures the day after the incident, and those pictures were expressly discussed at Beck's deposition, months before Sterling's motion for summary judgment. Moreover, Sterling made no formal objection, either in writing or at the hearing, to Kim's declaration, and the trial court did not strike the declaration or otherwise suggest that it should not be considered.[7]

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[6] The "incident" was defined in Sterling's form interrogatories as including "the circumstances and events surrounding the alleged accident, injury, or other occurrence or breach of contract giving rise to this action or proceeding."

[7] At the hearing, Sterling's counsel stated: "And the declaration that they submitted is of a witness that they did not even disclose in discovery, and her declaration is entirely vague and ambiguous, does not describe when she observed this light, whether she actually observed it in the dark or at night, and the lighting is not the condition on which

Accordingly, there is no basis for Sterling's claim that Beck should be barred from relying on Kim's declaration.[8]

In sum, the evidence presented in the summary judgment papers showed triable issues of material fact, making summary judgment improper. The trial court's conclusion that Beck could not establish that a dangerous condition on Sterling's property caused his accident is erroneous; Beck's evidence of conditions at the top and bottom of the stairs "'afford[ed] a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.'" (*Ortega v. Kmart Corp.*, *supra*, 26 Cal.4th at p. 1205.) Similarly, the evidence was more than adequate to present a jury issue on whether the dangerous condition alleged to have caused the accident – the broken step at the landing, debris at the bottom of the steps, and faulty lighting – existed long enough for a reasonably prudent person to have discovered it. (*Id.* at p. 1207.)

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they are attempting to assert liability." The trial court made no ruling suggesting he would not consider Kim's testimony; it merely stated that the case would not go to trial without her deposition.

[8] Sterling also contends that Farkas's declaration should be disregarded because Beck "abandoned his expert declaration" by "barely even mention[ing]" it in his brief to the trial court or at the hearing on summary judgment. Nonsense. Beck repeatedly cited Farkas's declaration in his separate statement of additional disputed facts, and Sterling made no objection to Farkas's declaration.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court with directions to vacate its order granting Sterling's motion for summary judgment and to enter a new order denying the motion. H T Beck is to recover his costs on appeal.

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COOPER, P. J.

I concur:

RUBIN, J.

BIGELOW, J., Dissenting

I respectfully dissent.

It is true that the California Supreme Court has stated that to prove causation in the context of a slip-and-fall case, the plaintiff need only " 'introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result.' " (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205.) However, it immediately thereafter goes on to explain: " 'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." [Citation.]" (*Id*. at pp. 1205-1206.) Such is the case here.

The fact that there was a broken step and debris at the top of the landing and debris at the bottom steps provide *speculation* and *conjecture* that the same debris was also on the middle steps and the source of Beck's fall. But there was no evidence presented by Beck that there was in fact such debris from the broken step upon which he fell. Where "the plaintiff seeks to prove an essential element of [his] case by circumstantial evidence [he] cannot recover merely by showing that the inferences [he] draws . . . are *consistent* with [his] theory. Instead, [he] must show that the inferences favorable to [him] are more reasonable or probable than those against [him]. [Citation.]" (*Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472, 483, emphasis original.) Here, the circumstances are "at best evenly balanced." Under such circumstances, the trial judge properly heeded his duty to grant the motion for summary judgment.

I also dissent in so far as the Majority's disposition directs the trial court to enter an order denying Sterling's motion for summary judgment. Even assuming there was a dangerous condition on the middle step, I would remand the cause with directions to the trial court to address the summary judgment motion anew, and to reach the "lack of notice" defense which Sterling also presented. (Maj. Opn. at p. 4.) The context in which the summary judgment was resolved left the "notice" element unexamined.

In other words, even assuming there was a dangerous condition on the middle step (some kind of debris), liability is not the mandatory result. Landlords are not insurers of safety, and absent a showing that the debris was on the middle step for some appreciable period of time, and that Sterling failed to inspect and clean the step in a reasonable manner, then I would not impose liability. At a minimum, I believe that Sterling is entitled to have the full extent of his motion considered by the trial court first.

BIGELOW, J.